

UPPER CLARK FORK STEERING COMMITTEE

MINUTES March 3, 1999

MEMBERS PRESENT:

Gerald Mueller
Steve Schombel
Robin Bullock
John Vanisko

Gary Ingman Ole Ueland
Jim Dinsmore Holly Franz
Eugene Manley Jim Quigley
Bob Benson

MEMBERS ABSENT:

Suzy Peraino
Liz Smith
Audrey Aspholm
Jon Sesso

Doug Mood Martha McClain
Jules Waber Brent Mannix
Robert Orr Mike Griffith
Don Peters Michael Kennedy

VISITORS PRESENT:

Steve Fry

Rich Moy
Art Compton
Julie McNichol
Terri McLaughlin
Mike McLane
Gaila Wortman

Avista
(Formerly Washington Water Power
DNRC - Water Management Bureau
DEQ Helena
DNRC Missoula Regional Office
DNRC Helena Regional Office
DNRC - Helena
Lewis and Clark Conservation District

The Upper Clark Fork River Basin Steering Committee met Wednesday March 3, 1999, in the Bannock Room of USF&G Building, Helena, MT.

WELCOME

Gerald Mueller welcomed Committee members and visitors and called the meeting to order. The agenda for this meeting will be as follows:

Water Quality Work Plan
Hydropower Water Quantity Negotiation Process (Avista Corp. formerly WWWP)
Update on Water Related Legislation

The minutes for the January 7, 1999 meeting were discussed and approved with two corrections. On Page 2, second paragraph the phrase as returned by a TMDL was corrected to read as required by a TMDL. On page 5 the Montana Water Resources

Association was incorrectly identified as the Montana Water Rights Association,

ANNOUNCEMENTS:

Gerald provided copies of the DNRC director, Bud Clinch, letter responding to the Steering Committee's offer of assistance.

WATER QUALITY PLANNING

Racetrack Creek

Gerald noted that activities are continuing on Racetrack Creek. Basin residents and agencies are still, to some degree in the visiting and investigation stages. Eric Reiland of Mt. Department of Fish, Wildlife, and Parks is currently out of town and will continue examining possible projects upon his return. Three projects have been examined and have potential. There has been some discussion of a grazing and habitat improvement project on the Hirsch properties. A rechannelization and habitat improvement project has been identified on the Ted Beck properties and water leasing is being examined along the dewater stream reach. The agencies still have to come up with and evaluate alternatives. The plan is to meet again with the watershed landowners in April.

Ole noted that he had a small water right on Racetrack Creek. John Vanisko noted that Racetrack Creek dewatering occurs from July 15 to October 1 of most years. Unless someone wants to give up the Ranch dewatering will be a hard one to solve. John also noted that there are two potential dam sites identified on Racetrack Creek above the campground. Many of the water rights have already been consolidated into a major "concrete ditch" as part of an earlier water conservation effort. Ole phrased John for their past work. We have to be positive about it (Water Quality Planning and Implementation).

Gerald noted that we have no illusion of this being easy. Further he noted that we need to assure people that this is a voluntary approach.

Fred Burr Creek tributary to Flint Creek.

Gerald noted that the Steering Committee was a powerful organization (we can even control the weather). A meeting was set for February 2, 1999, in Phillipsburg, Mt. On that day as he and Roxann Lincoln ate at the Sunshine Station the wind picked up and the weather turned terrible. During dinner one of the diners was called to the phone and informed that the roof of one of his buildings had been taken off by the wind. As a result not very many people showed up.

Jim Dinsmore has suggested that we attempt another meeting, maybe with a lunch or BBQ for May. There are a number of people who own or have purchased land up the Fred Burr drainage but do not yet live there. He is hoping that a May meeting might draw some of these other landowners.

Gerald also noted that the Abandon Mines Reclamation program staff had informed

Roxann that their monies cannot be used on site. Apparently previous work carried out on site disqualifies the site from future funding under that program. Roxann has noted that DEQ will be accepting new 319, Nonpoint Source Pollution grants, in early summer.

Nevada Creek, tributary to Big Blackfoot

A meeting with the Nevada Creek residents had been held. Gerald was unable to attend. Roxann did participate. It was reported that Nevada Creek landowners are implementing many management and stream restoration projects. Their principle concern at the meeting was related to the Bull Trout listing under the Endangered Species Act. Landowners are concerned their protection and stream improvement actions will be acceptable and have a positive impact on Bull Trout as may be required by the US Fish and Wildlife Service. Unfortunately, the Service has, to date, been unresponsive.

Rock Creek tributary to Clark Fork River

Gerald reminded the committee of earlier presentations to the Steering Committee in Phillipsburg, Mt., where agency representatives described the conditions on an impaired and braided stream reach on Upper Rock Creek. This reach affects 7 landowners, all of whom are actively involved in the discussions, and several miles of braided stream. This reach is on DEQ's 303D list of impaired streams as being in need of a TMDL (Water Quality Plan). A quick assessment had been conducted last summer. Eric Rieland of DFWP and Warren Kellogg of NRCS briefed the committee on that activity. The next phase being considered is the development of a feasibility plan.

Since the last meeting, the Upper Clark Fork Steering Committee has acted as an applicant for a \$20,000. grant through the River Net Work. Someone questioned who this organization was. Gary I. noted that he believed this was the same organization involved with the Alberton Gorge purchase announce earlier this week in the paper. The Steering Committee's role, as described in the grant, is to assist with public involvement and facilitate public meetings.

The total feasibility study budget was proposed at \$46,000. The plans were to considered rehabilitation of the stream reach and develop preliminary project designs. Gerald believed that this would be contracted out to Land and Water Consulting. Jim D. noted that the contractor hadn't been finalized. He also noted that the Granite County Conservation District had applied for 223 grant funds too. It was noted that Annette Johnson was working with the local conservation district on the project. Gerald also noted that other funding sources being investigated included Future Fishery, Milltown Mitigation monies and US Fish and Wildlife Service. (GERALD I BELIEVE YOU LISTED OTHERS BUT I MISSED MANY OF THEM. CAN YOU HELP CLARIFY THESE SOURCES?)

Steve Schombel questioned where it had been determined that restoration was necessary. He understood that there might be some question as to the braiding of the stream in this area being a man caused problem and an impairment. TU had been asked to participate in the funding. At this time, they have not committed funds to the

project but are staying informed.

Gerald noted that funding requested to date addresses only the feasibility study. Rough estimates for rehabilitation have been estimated at \$2 million.

Little Blackfoot

Jim Quigley asked for direction and advice from the committee. In his area, Sixmile Creek and other tributaries to the Little Blackfoot, landowners are wondering if there really is a problem. Many wonder if the problems being observed are not natural phenomena. Further, many landowners are already involved in the Nevada Creek project. He wonders if they shouldn't wait until more experience is gained on other pilot projects.

Gary I. noted that Sixmile is currently on the 303D list. DEQ is now reviewing that list and assessing substantial credible data to determine if these streams should remain on the list. He was concerned that if there are questions as to the appropriateness of Sixmile being on the list perhaps DEQ should meet with the area residents and have them involved in the review. Maybe the starting point is a dialog with the residents to make sure DEQ and the landowners understand the issues and process.

Jim noted that the stream is an important source of irrigation water and it is heavily utilized. There is also competition between irrigators. Ole asked if dewatering was considered a water quality problem. Gary noted that dewatering impacts aquatic life support, a beneficial use as defined by water quality law. Therefore, dewatering is considered an impairment. Dewatering is a difficult problem. There are many constraints. The state TMDL statute also places limits on a TMDL taking water rights. He suspects that we may not be able to fix all of the dewatering problems. We will have to examine dewatered streams looking for opportunities.

Robin Bullock asked if DEQ contemplated meeting with people in all areas. Gary indicated that DEQ's TMDL outreach watershed planners have been meeting with interested groups in most areas. They were also working hard on the evaluation of the 303D list. Temporary staff have been hired to assist in existing data review. DEQ will probably not be able to meet with every drainage before the new 303D list is published. He thought that they could meet in the Blackfoot. It is close enough that Mike Suplee might be able to do some on-site examination too.

Gerald noted that the Steering Committee had sponsored an earlier meeting in the Blackfoot. During that gathering watershed residents noted that they were already actively involved in a number of sites. He reminded the committee that a resident, Mrs. Wills, of the Potomac area had contacted the Committee through him, had voiced some interest, and had been given a standing invitation for the a Steering Committee hosted meeting on Water Quality Planning.

Gerald noted that Jim Dinsmore has given the committee good advice in the past to not push too hard and to work with those who believe they have a problem. Ole noted they we (agriculturists) were busy and sometimes we need a bit more motivation. Someone needs to help us meet our potential.

Jim Dinsmore noted that a lot of streams are in the assessment stage. How will this water quality work be keyed into or coordinated with Bull Trout? Jim had been told by a FW&P employee that the US FWS has asked them to assist the Forest Service in evaluating all of their grazing leases for Bull Trout impacts. Gary stated that DEQ looks at FW&P database for use support information. DEQ will also look for the bull trout core areas (critical habitat) and critical fishery reaches. DEQ and FW&P are some ways are in the same business, both have concerns for aquatic life support, which for many areas focus upon salmonid fisheries. He noted that FW&P has been criticized for not developing plans for all core areas in the recovery plan.

Robin wondered if the FW&P will be required by FWS to move the recovery plan from a voluntary to a regulatory plan. Gary noted that the plan is still voluntary but FWS must still approve the plan. Gerald noted the FWS has yet to determine a direction. They are still struggling with the issue of taking.

John V. asked how many dollars are available for Water Quality Plan implementation? Gary noted that Montana's share of 319 for grants was about \$800,000 this year and the Clean Water Action Plan approval augmented 319 by 1.2 million. There are also Resource Indemnity Trust and Future Fishery monies.

John asked if any of this money was priorities by basin. Gary indicated that 319 money was competitive statewide. Mike M. noted that critical basins were prioritized using the Clean Water Action Plan monies. The activities of the Steering Committee, Blackfoot Challenge, and Nevada Creek all aided in identifying the Clark Fork as a priority basin. These were basins ready to receive funds. John asked if FWS had any grant monies. Gary didn't know.

Gary indicated that he would be very interested in hearing of the progress being made in implementing the Natural Resource Damage suit monies and responsibilities. Robin noted that there are specific requirements in the consent decree related to the development of restoration plans. Ole noted that we need to set priorities.

Gary asked Jim Q. if they should work on getting back together with people in the Little Blackfoot watershed BEFORE the new draft 303D list is prepared. Jim didn't know. He is worried about implying any threatening action because people get on the defensive. However, it's hard to get people involved. If we had more definitive concerns and clear plans to implement it might be easier. Gary noted that in the smaller watersheds DEQ has talked about doing a list review. Would this be of value? Gerald suggests that we offer the option of doing a draft list reviews but to not hold any meetings that are not necessary. Jim D. suggested that we let the pilots move forward and see some success before getting real active in the Little Blackfoot.

WATER QUANTITY MANAGEMENT ISSUES

-- AVSITA, STATE OF MONTANA, AND FERC

-- PROCEDURAL AGREEMENT and NEGOTIATIONS

Steve Fry of Avista (formerly Washington Water Power), Rich Moy of DNRC and Art Compton of DEQ were in attendance to introduce the recently created negotiation process to address water quantity management inter-relationships between Avista dams and other water rights in the entire Clark Fork Basin. Jim Dinsmore, Steering

Committee member and potential affected water user, has also been appointed by the Governor as a negotiating team member.

Rich introduced the procedural agreement signed by the parties on January 12, 1999. On January 29, 1999, the Governor's office notified Avista Corp. of its negotiating team. The procedural agreement establishes a process and conditions under which the parties could negotiate a long-term agreement. That agreement, if developed, has as a goal: to equitably and legally balance the water right interests of Avista and the interest of the State in the beneficial uses of water for power and other public purposes, including consumptive uses defined by Montana Statute.

The procedural agreement identified the Governor and Avista's Chairman of the Board and Chief Executive office as the decision making officials for the respective parties. The agreement also called for the identification of the negotiating team by February 1, 1999 and set a deadline of May 1, 1999, for the first meeting where parties will establish a tentative schedule, identify responsibilities to be undertaken, and present initial working proposals.

The procedural agreement identified intermediate review dates and March 1, 2000, as the target date to complete negotiations. At that time parties can extend or break off negotiations or move to arbitration. The moratorium on making call and issuance of new surface water rights terminates February 28, 2001.

The parties have also agreed that any agreement executed by the parties may be subject to approval by FERC. Further, Avista shall make good faith efforts to have the relevant terms of any agreement executed by the parties made a condition of the FERC license.

The January agreement, entitled Moratorium Agreement between the State of Montana and Avista Corporation, signed by Governor Marc Racicot and Avista Corporation, proposes MUTUAL MORATORIUM where:

Avista shall not initiate any call upon junior water right holders on the Clark fork river and its tributaries prior to February 28, 2001, and
The State shall recommend and seek with Avista's support a temporary moratorium through legislative processes on the issuance of new consumptive water use permits from surface waters the Clark Fork River and its tributaries (emphasis added).

Senate Bill No. 468 implements the first phase of the negotiation process by seeking the water right permitting moratorium. This bill proposes:

create a temporary basin closure that terminates February 28, 2001;

close surface water sources in the Clark Fork Basin to the development of most **NEW** water rights through either the permitting or state water reservation process;

- a) effect all of the Clark Fork River and its surface water tributaries above the Noxon Rapids Dam, including the entire Flathead Basin;
 - b) allow for the development of domestic and municipal water uses;
 - c) allow for emergency appropriations of surface water; and
- recognize and integrate other existing and proposed administrative and legislative basin closures within the Clark Fork watershed.

The State's negotiation team includes Don MacIntyre and Jack Stults from DNRC, Chris Hunter from FW&P, Art Compton from DEQ and Jim Dinsmore.

Rich stated that Avista has the largest water rights in Montana. Cumulatively their water rights total 50,000 cfs at Noxon Rapids Dam. Rich stated that they are not being picked on. The same issue is occurring with the former Montana Power Company hydropower holdings on the Missouri River. In the Madison/Missouri process the state intervened in that FERC proceedings with similar water management concerns. The state also commented on FERC's Madison Missouri Draft EIS.

The Federal Power Act requires FERC to balance competing uses of water when licensing power facilities. The state is simply asking FERC to consider a balancing consumptive water uses in addition to their fishery and water quality uses. FERC's decision will hopefully be out in a few months. DNRC's concern is primarily some level of protection to junior surface water rights. This is still the key issue.

Rich noted that the Avista process is different. Washington Water Power choose to submit an applicant prepared Environmental Impact Statement and License Application both developed through a collaborative process which included affected stakeholders. Unfortunately, the collaborative process broke down in the last stages as they attempted to address water quantity issues.

Rich stated that DNRC's primary concern is the development of some level of protection for junior surface water rights. This is still the key issue. There are some 7,000 surface water users who are junior to the Noxon Rapids Dam facility. Washington Water Power has never made a call on any of these junior users. The Noxon water rights were developed through a filing at the court house and not through any public participation process. (The water rights for Cabinet Gorge we approved through a legislative process and are conditioned to allow upstream future municipal and irrigation development.) Junior users in the Clark Fork have invested in and developed their projects without the knowledge of or intervention of the Noxon rights. Further, Washington Water Power has never formally objected to the development of a new water right in the basin. DNRC's proposal has been for Avista to continue their historical operational practices, including not making call on junior water users.

Jim Q. asked if the negotiation process or the basin closure would affect the water court processes. Holly noted that they shouldn't affect the water court, however, it may affect new and junior water users. The existing basin closure, like the Upper Clark Fork Basin Closure has precedence over the proposed Clark Fork Temporary Closure. Further, the negotiation process won't cause changes in the Clark Fork.

Holly asked Rich if the Settlement Agreement was signed. Steve F. noted that one of the requirements of the Procedural Agreement was the signing to the collaborative Settlement Agreement. The governor signed the settlement agreement resolving the other negotiated issues. In fact implementation will begin this month. The Settlement Agreement creates a Management Team and two work groups Water Resources Work Group and Terrestrial Work Group. Members of the groups are getting materials this week related to the implementation of the Settlement Agreement and mitigation efforts outline in that document. Monies are being used for implementation before the FERC

licensee has been approved.

Holly asks if negotiations are unsuccessful what is next.

Art Compton responded indicating that DEQ is the states lead agency in the licensing Process. DEQ is required by state statute to intervene in FERC processes and deliver a report on the states conditions and concerns. The water right issue will be part of the state's report whether negotiations are successful or not. If unsuccessful the state will ask FERC for conditions which present the state case. Art noted that historically Montana has not been highly successful in advancing the state s position in the FERC process.

Rich noted that under the federal Power Act FERC must balance consumptive and non-consumptive uses. MPC / Madison Missouri intervention may give some guidance.

Steve S. asked if the negotiations might over turn the other Settlement Agreement issues. Steve Fry noted that there was a big push being taken by Avista to get the Settlement Agreement finished. That agreement is now part of the FERC application. It got pretty intense near the end of the collaborative process to get signatures. Again, signing of the agreement is part of the Procedural Agreement defining the side boards for water quality negotiations. With the Settlement Agreement much of what is agreed upon will be implemented by July 1, 1999.

Steve noted Avista would like to look at balancing of beneficial uses. The Settlement Agreement will help establish watershed councils locally. Avista is willing to take decisions into the local level with opportunities for local input. The agreement actually creates flexibility and funding on a local level. Avista is comfortable with the moratorium agreement. He indicated that they have appointed their negotiation team which will include, Larry LaBolle, Blair Strong and himself (Steve Fry).

Rich stated that DNRC is supportive of watershed councils had provide technical and funding support to many. However, the reality is some level of protection for junior users.

Gary Ingman noted that the Settlement Agreement is similar to the Upper Clark Fork River Basin Steering Committee. However, can the procedural agreement format successfully develop a water management agreement within a year? Gary was concerned that all beneficial users were to be addressed, including water quality related uses. Rich stated that DNRC does not believe Avista should be faced with the burden of addressing these local issues. Avista should not be responsible for fixing headwaters, dewatering, and water quality problems.

Gerald noted that Don MacIntrye stopped just prior to the meeting and delivered his apologies for not being able to attend. However, Don did express the concern that the scope of the negotiations should be narrowly focused. Don s interests were clearly water quality. The concept of incorporating drought planning is to broad a scope. Gerald wondered what the potential linkages were. In negotiations often you give up something to gain something else.

Rich note that DNRC is wide open to suggestions. DNRC does have a goal to protect junior water users. He also noted that no one except DNRC has offered any proposals.

Gerald noted that when the Steering Committee has had discussions on water management they have often look at how to deal with shortages. The committee has often questioned whether water right enforcement is the only way to allocate stream flows.

Jim D. asked where Avista was coming from; are they looking to the future and increasing hydropower development? Steve Fry noted that any type of significant change in operations falls into the Settlement Agreement process for changing dam operations. Those changes are evaluated and approved by the collaborative multi-stakeholder Management Team.

Steve also noted that Avista felt that their water rights were a property right. Agreeing to the DNRC's proposals placed the company at risk of being inspected by too many commissions and regulators who might view the action as decreasing the companies base property and value. Further, they didn't see much benefit to subordinating a junior right to a 1974 right.

John V. asked who was going to administer and patrol the river. This difficulty is the practical aspect of why, Steve Fry noted, a call hasn't been made previously. This is why Avista has encouraged better management of water within small basins before making a call.

Rich noted that the FERC license is a 50 year license. It may be tough to make a call but basin conditions are changing. The adjudication process will be completed. Hydropower users in the basin are being deregulated. Someone else may own Avista in a few years and they may wish to make a call or someone else may push Avista to make a call to satisfy other concerns. This uncertainty is why DNRC is attempting to protect the status quo.

Steve replied that Avista has agreed to historic operations in the Settlement Agreement. Any changes in operations must go through the Management Committee. Rich is now a member of that committee. Avista would also like to retain current operations unless there is some overwhelming need to adjust operations.

Jim Q. asks how Avista will meet the demands for power created by the growing population and growing electrical demand. Can Avista get bigger? Steve indicated that from an economic stand point it was not feasible to expand the Noxon capacity. Increased electrical demand would be met through other projects.

Holly noted that one of the first things the negotiation team will need to do is define the issues to be addressed. They will then probably have to determine where (geographically) issues exist and a big part of that is the job determining who gets affected. Jim D. stated that there are times where upstream junior users are using water, local senior users are satisfied and Washington Water Power doesn't get their water.

Robin indicated that you have to take a whole basin approach. It is not appropriate to

terminate a big companies water use. Rich asked how many people in 1950 knew that their water rights would be junior to this downstream power company. Robin as if the state was suggesting that none of those junior users have a responsibility for management. Can they be subordinated? Rich noted that protection of junior uses might affect power generation by four tenths of one percent.

Holly noted that it is interesting that the procedural agreement has created the only opportunity to accomplish that, which through formal intervention was not possible. No other power company has ever agreed to sit down on this issue.

Steve noted that Avista has not been able to direct any significant time preparing for future negotiations. He expects the first negotiation meeting to look at ground rules and the forming of initial concepts. That meeting is to be scheduled prior to May 1, 1999.

John asked if the negotiation teams had any ideas or directions of what they needed from the Steering Committee.

Gerald noted that up to now there have been no broadcasts of the issue. The initial challenge is to inform people, without scaring them provoke interest without a fear response. Gerald asked the committee for ideas. How can the Steering Committee help people stay in tune?

The committee began discussion of proposals. Bob Benson asked if it were possible to give space in the Clark Fork newsletter to this concern. Could this newsletter also be sent to other basins? Development of a news release was suggested. News release will involve and incorporate comments from the parties and negotiation teams. New release distribution would be throughout the basin. Steve Schombel asked how many people in the Flathead basin know of the Clark Fork Water Right closure bill. Gary I. suggested a series of meetings within the Upper Clark subbasins on the issue. The Steering Committee could work closely with the negotiation team in developing the meetings. Eugene suggested that some basins are more impacted than others. The Big Blackfoot is one. Could the state identify who is junior to Noxon Rapids Dam? Rich noted that the water rights data base can be used to identify these junior users. Work has already been completed to identify many of these junior users. A listing of all water right holders who irrigate using more than 5 cfs from surface sources was shared with the Steering Committee last fall. Rich has also generated a list of all surface and ground water users for any use greater than 50 gallons per minute. It was asked if a individual notice could be sent to each of these users?

Ole asked if we don't have an opportunity to develop water. Gerald noted that the Clark Fork Closure provided an exemption for storage. Mike noted that the issue of storage was a concern for Willow Creek Reservoir. They may be the largest user junior to Noxon Rapids Dam in the upper Clark Fork basin. The question, of course, is if Avista will make call on a junior storage project in low water years to get immediate benefits or if they will seek the delayed benefits of late season releases and return flows.

John V. asked who will come first hydropower or Bull Trout? Art C. noted that DEQ needs to protect water quality and DFWP needs to protect fish and wildlife. There are three agencies involved in the negotiation process and all three interests will play into

the settlement. Rich again noted that these other issues are state and local issues. The state shouldn't put a burden on Avista to solve these problems in tributary streams.

Bob B. ask how in the 1950 s could one file water rights on more water than one could use. Holly noted that a water right typically describes the maximum appropriation. The same is true of Avista s rights. The 50,000 cfs is their maximum use during runoff or peaking. It does not reflect year round use.

Bob asked if the committee drafted a proposal or issue paper would or should it include the views of the state and Avista. Further, if meetings are held, can they provide an avenue to deliver public comments back to the negotiation team? Jim D. noted that a basic question is if the Steering Committee does something should this information go elsewhere?

Rich Moy suggested that common concerns should be submitted to the negotiation teams.

(Lunch)

Upon reconvening Gerald asked if the committee should notify Bud (Bud Clinch, Director of DNRC) of options recommended by the committee. Do we wish to hold a series of meetings in the communities?

Gary suggested that the negotiation team meet first so we know what the process sideboards will be. Jim D. agreed. We are worried too much about public relations before the negotiation team gets together. Its up to the negotiation team to say when.

Gerald asked if it was acceptable to contact Bud, indicating that the committee is willing to hold public meetings and contact the public through news articles and the newsletter as the negotiations begin.

John V. noted that it will take some time to put this together. It would take at least 30 days. Would the steering committee be able to respond? Gerald speculated that it will probably take several meetings for the parties to identify the constraints of their negotiation process. The public must be told something as soon as possible. Robin noted that we could discuss the known issues now moratorium and negotiation process goals. Gerald noted that information needs to be released about that process.

The first negotiation team meeting date is to be scheduled prior to May 1, 1999; however, most of the state s negotiation team also has a lead role in agency participation in the legislature. Holly pointed out that the regular session is slated to end April 24, 1999. This is a week prior to the May 1 deadline. Ole felt that we needed to get with the public now. Jim D. stated that the problem is our ability to accurately relate to the public what the concerns are. The longer people go without notice the harder it will be hold a dialog.

Holly noted that the Clark Fork Closure bill went through the Senate ok. There were no dissenting votes. Rep. Mercer may be central to the success of the bill since he is both a representative of the Flathead and in House leadership. Holly was not sure of his position or if he knew of the Bill. She wondered if the closure bill might now have

problems in the house.

Jim Q. noted that FERC is powerful and wondered what we could do. Steve Fry noted that FERC doesn't like conflict. There are ways to introduce a local argument. However, it is new ground for FERC. If Avista and the other local stakeholders can develop an agreement it is likely that FERC will adopt those recommendations especially if they are also approved by the Management Committee. However, if the parties reach an impasse then FERC will settle along their traditional jurisdictional authorities.

The committee agreed that appropriate steering committee actions included:

- developing a news release,
- dedicating a newsletter article on the negotiations, and
- holding public meetings within the basin.

Items discussed and set aside as inappropriate or not currently practical for the committee included:

- individual notice to a of the basins junior uses (This may be a good idea but it is an agency responsibility.),
- distribution of the Upper Clark Fork newsletter to other watersheds. (Due to both practical considerations related to mailing list and expenses and concerns that the Steering Committee may not wish to direct the activities and local control of another watershed it ideas was set aside.)

Gerald will talk with Bud or send a letter confirming the committee's concepts and continued willingness to participate.

Report to the Legislature

Gerald Mueller updated the committee on their status report to the legislature. The report had been sent to all Senators and Representatives in and adjacent to the planning area, the Water Policy Committee, Legislative Environmental Policy Council, Conservation Districts, Directors of DNRC, DEQ and DFWP, and County Commissions. (Gerald is this correct??? Did we sent to the NRCS office in Deer Lodge, Phillipsburg, and Missoula how about John Blaine Watershed team leaders. I am worried about missing someone.)

Jim asked if any responses had been generated. Gerald indicated that one Representative had called with questions (Who and on what -- my notes were very poor here.)

Legislation

Holly Franz, with some assistance briefed the committee on several pieces of water related legislation. A copy of the Montana Legislature's homepage, Laws Bill Search Result was handed out. This was an Internet search for all water related bills, conducted on 3/1/99.

The first bill discussed was HB 205, Ditch Access Easements by Rep. Tash. The committee also examined this bill at there last meeting. This bill has passed the house (99 0) and has been moved to the Senate Local Government Committee. Holly

wondered if it might not meet more resistance there. This bill revises existing subdivision regulations requiring the subdivider in most instances to 1) establish ditch easements for delivery of irrigation water to person and lands legally entitled to the water or under to remove the water rights through appropriate legal or administrative process or where lot size is 1 acre or less notify landowner of assessment for water delivery and 2) require subdivider to file and record ditch easement of unobstructed use of existing water delivery ditches and facilities. Holly noted that some amendments had been made to the process of filing easements. Questions were asked as to why there were concerns on existing ditches. Didn't they already have an easement? Holly noted that most ditch easements were developed by agreement or prescription and very few have a recorded record.

Senate Bill 407, revising the Adjudication of Water Rights, by Cindy Younkin is moving forward. The bill has been heavily amended. Many of these changes were developed through discussion with practitioners as the bill moved through committee. The chief water judge, Judge Loble, testified at the hearing as an informational witness. He was critical of the bill and its original proposals that redirected court authorities. At issue were the courts authority and responsibilities to review stipulations and to address water rights with apparent discrepancies but where no objectors had come forward. The Court frequently uses the DNRC as a technical reviewer in these instances. Some of the legal community is concerned with this operation. In its current form the bill requires the Supreme Court to develop rules directing Water Court procedures for review of settlement agreements and objections. The bill also clarified the courts ability to address previous decreed water rights where the limits of the historic decreed right have been exceeded by the existing claim or claims.

The Temporary Clark Fork Closure Bill, Senate Bill 468, was passed out. Holly noted that this bill will not affect our Upper Clark Fork closure. The bill has a section, New Section 1 subpart (3), which give precedence to all existing legislative of administrative closures. Holly also noted that it is interested to watch how each basin closure is tailored to meet the needs of the watershed. During the committee hearing, the stock growers and Montana Water Resources Association asked for a stockwater use exemption to be added. Other exemptions included an exemption for all ground water, domestic supplies, municipal use and temporary emergency appropriations. The closure is temporary ending February 28, 2001.

Mike informed the committee that the Bitter Root Water Forum and Bitterroot Water Cooperative began their discussions and process with a permanent basin closure bill modeled after the Upper Clark Fork Basin Closure. However, as the legislative process neared and sponsors, supporter, and partnerships were clarified, the bill format changed. One key legislator was very concerned with the negative impacts of a section requiring ground water report. It was his feeling that a problem does not now exist and unnecessary expenses and constraints were being added. The bills sponsor also voiced a concern and a philosophy that every piece of legislation should have some type of sunset provision. The make up of a review committee became an item of discussion before the sponsor. As a result the closure became a temporary closure ending with the issuance of a final decree. Several water users and consultants during public meetings argued that waiting to the final decree held them hostage to the federal government and settlement of the Salish Kootenai tribe water rights. Currently, the bill is a temporary basin closure. It closed the entire basin by subbasin. Each of six subbasins will have 2

years after the creation of an enforceable decree to extend, modify, or let terminate the subbasin closure. (An enforceable decree is a decree temporary preliminary or preliminary where the court has heard all objections and issued a decision.) Exemptions to the closure included groundwater, municipal, temporary emergency appropriations and storage of high spring flows. Holly again noted that each basin has unique concerns. In most basins stockwater is a common and excepted exemption. In the Bitterroot, new private fishponds are fed by already heavily or over appropriated streams. There is concern that proposed new stock ponds will actually become fish or aesthetic ponds. She also noted that the storage exemptions was limited to storage greater than 50 acre feet an attempt to define storage projects separate from small ponds being called storage.

Karl Ohs is carrying House Bill 458, Adding Assistance with interagency coordination & evaluation to responsibilities and compilation EQC s and Evaluation of BMP.

Apparently the original bill was of concern to a number of entities. Those who have already done substantial work on BMPs, Livestock and timber industry, were concerned of impacts to their collaborative and volunteer efforts. Conservation districts have some concerns related to redirecting resources away from implementation to reviews and potentially duplicative development. In its current form EQC is to assist with interagency coordination related to Montana s water resources. In new section 2, EQC is to review and summarize federal, state and local policies and programs related to streamside corridor and riparian management, coordinate with existing groups to evaluate existing streamside and riparian best management practices, and review existing education information programs regarding voluntary BMPs.

House Bill 629, by Representative Doug Mood, An act directing the DFWP to conduct a comprehensive study of the Blackfoot River use and Conflict was discussed. This bill has been refereed to committee but no hearing appears to have been held. The bill directs DFWP of undertake a comprehensive study of the Blackfoot river, examining growing popularity, ways to mitigate conflict among landowners, recreationist and outfitters, way to protect the integrity of the rivers resources, amount an scope of use, easements and rights of way access, trespass concerns, and use impact on the rivers fish, wildlife river banks and water quality. Findings are to be reported to the 57th legislature. Bob B. wondered why it was introduced. He is participating in a comprehensive study now underway to examine these same issues in the Blackfoot. This bill appears to duplicate these efforts. He asked if this bill might be legislative recognition of this current effort? No one on the committee could answer these questions. Holly was not sure of the bills status.

Senate Bill 98, the bill extending FWP s In - Stream Flow Leasing Program submitted by Ken Mesaros was discussed. The committee examined this bill at their previous meeting also. The bill had passed the senate 46 3 on third reading and has been refereed on the House Natural Resources Committee. A hearing was scheduled for March 3, 1999. The amendments in Section 1 are simply reference to the Upper Clark Fork in-stream flow leasing study and the statewide in-stream flow leasing process developed through the Consensus council s process. The DFWP leasing study is still a temporary program with a termination date of June 30, 2009. The length of leases for water conservation or storage project is increased to a potential of 30 years. A new subpart a, was created for section 436. This subsection clarifies that DFWP can also carry out leases in the Clark Fork drainage under section 439 the Upper Clark Fork program.

The last bill discussed was Senate Bill 371, also carried by Mesaros, which will have additional criteria added to 85-2-306 (1). This is the section of statute where small wells (35gpm up to 10-acre feet per year) are exempted from the permitting process. Mike was unsure what the circumstances were that stimulated this proposal. This bill adds a provision that a person drilling a well on ground where they are not the land owner must give written notification 30 days prior to construction or if through existing works 30 day prior to appropriation of water. Mike wondered if this bill might not cause more problems than it resolves. Under appropriative theory of water law an appropriator need not own land adjacent to the water source to acquire a water right. They can cross another s property to access and deliver water. If negotiations cannot resolve the access issues the court can evaluate the access and associated takings issues. Mike wondered if this language might actually complicate or confuse the existing land owner s rights. The bill raises several interesting property right and easement issues.

Legislative discussion closed with Holly talking about Senate Bill 235 carried by Jack Wells. This bill defines new unique criteria to judge abandonment for municipal water supplies in water rights in basin designated as A1 Closed (public water supplies). Holly noted that legislation creates very unique and differential treatment of certain municipal supplies. The legislation first declares claims for municipal uses in such circumstance as a unique water use. Further, it is declared that such rights are NOT abandoned if the right or any part of the right has been used for municipal supplies, have obtained a filtration waiver under the Safe Drinking Act, acquire or maintained diversions and conveyance structures, conducted a study that conclude that using the water for municipal supply is feasible for foreseeable FUTURE NEEDS, OR (emphasis added) maintained facilities to apply the water right to an emergency or supplemental municipal supply.

NEXT MEETING

The next meeting was scheduled for after the legislative session and after the time frame for the first meeting on Avista negotiations. It was hoped that at this point the sideboards for the negotiations process might be defined and the Committee could assist with public comment.

Gary was very interested in learning the status and progress of using the Natural Resource Damage Suite implementation plans. Robin and Gary suggested getting a speaker from the State team to speak on these issues.

Jim D. again indicated that FWP had been asked by United States Fish and Wildlife Service (USFWS) to evaluate United States Forest Service (USFS) grazing allotments for impacts on Bull Trout. Wayne Hadley had been asked to evaluate 20 allotments. Jim suggested that we get an update on Bull Trout listing, the issue of take and plans for restoration. Jim felt that USFWS actions may be indicating that decisions on implementation were being formatted and it was important to share that information with local entities. Robin noted that she though that the comment period on the recovery plan ended, comments were in, and that the statewide plan may be done.

Gerald indicated that he would get participants for the next meeting to address these issues. The date for the next meeting:

Thursday, May 6, 1999,
in the Saint Mary s Center, Deer Lodge, Montana.